Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

S & D TRADING ACADEMY, LLC,
and S & D GLOBAL TRADING INC.,

Petitioners,

v.

AAFIS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Texas and the federal government each have securities acts that require investment advisers to register with the proper authorities. The acts each contain an exception, however, for persons who are engaged in certain types of activities. One of these exceptions pertains to a "teacher." This Petition presents the following issues:

1. Does the Texas Securities Act, TEX. REV. CIV. STAT. ART. 581-4N, which provides that an "investment adviser" does not include a "teacher" "whose performance of the services is solely incidental to the practice of the person's profession," encompasses the activities of Petitioners who were not acting as "brokers" as that term is understood at law and who did not receive transaction-based compensation for their efforts?

2. Whether the Court of Appeals properly followed, or should have followed, several no-action letters issued by the Securities and Exchange Commission (SEC) which interpreted the teacher exception that is contained in the federal Investment Advisers Act of 1940, Act of August 22, 1940, 54 Stat. 847, 15 U.S.C. §§ 80b-1 – 80b-21.

PARTIES TO THE PROCEEDINGS

The Petitioners were Plaintiffs in the District Court and Appellants in the Court of Appeals, and are S&D Trading Academy, LLC, a Texas limited liability company and S&D Global Trading, Inc., a Texas corporation.

The Respondent was the Defendant in the District Court and Appellant in the Court of Appeals, and is AAFIS, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner S&D Trading Academy, LLC is a privately held Texas limited liability company and Petitioner S&D Global Trading, Inc. is a privately held Texas corporation. Both entities are located in Spring, Texas.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, S&D Trading Academy, LLC, a Texas limited liability company, and S&D Global Trading, Inc., a Texas corporation ("Petitioners"), seek this Court's review of the Opinion issued by the Court of Appeals for the Fifth Circuit. App. 1-23.

OPINION AND JUDGMENT BELOW

The Opinion and Order of the United States District Court for the Southern District of Texas, Galveston Division, dismissing Petitioners' case, was filed June 3, 2008. It is unpublished, but appears in electronic format at 2008 WL 2325167 in Westlaw. It appears herein as App. 24-26.

The Opinion of the Fifth Circuit Court of Appeals, July 1, 2009, affirming the judgment below, was not selected for publication in West's Federal Reporter but appears in electronic format at 2009 WL 1885881 in Westlaw. It appears herein as App. 1-23.

STATEMENT OF JURISDICTION

The Court of Appeals for the Fifth Circuit issued its per curiam opinion on July 1, 2009. App. 1-23. No motion for rehearing or petition for rehearing en banc was filed in the Court of Appeals. The Supreme Court possesses jurisdiction under 28 U.S.C. § 1254 because

this Petition for Writ of Certiorari was filed within ninety (90) days following the issuance of the final decision of a United States Court of Appeals. 28 U.S.C. § 1254; Sup. Ct. Rule 13(1). The decision below wholly involves the interpretation of a Texas state statute which mirrors a United States statute, and in interpreting the state statute, both the District Court and the Court of Appeals interpreted and applied federal authorities that interpret the United States statute.

STATUTORY PROVISIONS INVOLVED

The District Court and the Fifth Circuit Court of Appeals decided this case solely on the basis of an exception contained in article 581-4N of the Texas Securities Act, TEX. REV. CIV. STAT. ART. 581-4N. The Texas statute is closely modeled after the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 – 80b-21, a federal statute that accordingly mirrors the Texas legislation.

Because the federal and state securities acts are lengthy, and this Petition involves a narrow portion of them, only the relevant portions of the statutes are set forth herein.

1. Texas Securities Act, TEX. REV. CIV. STAT. ART. 581-4N. The Texas Securities Act defines "investment adviser" as follows:

> N. "Investment adviser" means a person who, for compensation, engages in the business of advising another, either directly or through publications or writings, with respect to the value of securities or to the advisability of investing in, purchasing, or selling securities or a person who, for compensation and as part of a regular business, issues or adopts analyses or a report concerning securities. . . . *The term does not include*: . . .
>
> > (2) a lawyer, accountant, engineer, *teacher, or geologist whose performance of the services is solely incidental to the practice of the person's profession*. . . .

Id. at art. 581-4N (emphasis added). The Texas statute does not define the term "teacher."

2. The federal Investment Advisers Act, 15 U.S.C. §§ 80b-1 – 80b-21. The federal Investment Advisers Act of 1940, Act of August 22, 1940, 54 Stat. 847, 15 U.S.C. §§ 80b-1 – 80b-21, defines "investment adviser" as follows:

> (11) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; *but does not include* . . .

> (B) any lawyer, accountant, engineer, or *teacher whose performance of such services is solely incidental to the practice of his profession*. . . .

Id. § 80b-2(a)(11) (emphasis added). The federal act does not define the term "teacher."

I. INTRODUCTION

Both the State of Texas and the federal government have securities acts that require investment advisers to register with the proper authorities. The acts each contain an exception for persons engaged in certain types of activities. One of these exceptions is for someone who is a "teacher." Neither act specifically defines the term "teacher," however, and federal courts often look to opinion letters of the Securities and Exchange Commission (SEC) to interpret the federal act.

The issue raised by this Petition is the scope of the teacher exception to the investment adviser requirement that is found in the Texas Securities Act, TEX. REV. CIV. STAT. ART. 581-4N, and by implication, the same provisions of the parallel federal Investment Advisers Act of 1940, 15 U.S.C. § 80b-15(b). Each statute contains a "teacher exception" that is for all intents and purposes identical. The lower courts based their decisions solely on the teacher exception contained in the Texas Securities Act, and the opinion of the Fifth Circuit Court of Appeals relied exclusively on no-action letters of the Securities and Exchange

Commission which are often used to interpret the federal act. Thus, the appellate opinion (App. 1-23) is also an interpretation of the federal authorities construing the federal act, and as such warrants this Court's attention.

As shown herein, both lower courts interpreted the teacher exception far too narrowly and restrictively, resulting in injustice under the facts of this case.

II. FACTUAL BACKGROUND AND STATEMENT OF THE CASE

The Opinion of the Fifth Circuit Court of Appeals, App. 1-23, generally states the underlying facts. This Petition concerns the proper interpretation of a statutory term.

In early 2005, AAFIS approached Donald J. Cleary about giving training on the day trading of stocks. AAFIS, a Los Angeles based investment company, is an active trader in the United States stock markets. It employs a company based in China called Asian American Association, Shen Yang, Limited Liability Company ("ASY"). ASY employs Chinese citizens to trade on AAFIS's account, but ASY's employees first need to be trained. Cleary was to train 28 of ASY's Chinese traders. Cleary recruited Robert Compher to assist him with the training. Those two formed S&D Trading Academy, LLC and S&D Global Trading, Inc., through which they would provide their services to AAFIS. App. 2.

S&D entered into an oral agreement with AAFIS to train the ASY employees. S&D would receive a base compensation of one dollar for every thousand shares traded during a six-month probationary period and for up to 36 months thereafter. Bonus compensation would be based on the profits generated by the traders. Training occurred both in Texas and China. While in Texas, S&D performed most of its training in an apartment furnished with tables and computers; the Chinese traders both worked and lived there. The training consisted of Cleary's and Compher's monitoring the live, on-line trading activities of the ASY employees. Cleary and Compher provided such training for a continuous period of approximately 16 months. App. 3.

Petitioners were hired to act as teachers and were doing so when they provided their services to AAFIS. Mitch Cariaga was a consultant for AAFIS who helped develop AAFIS's on-line trading business. He served as the contact between AAFIS and the Petitioners. Cariaga was tasked to teach other people to learn how to do on-line trading. He located Petitioners and had them train AAFIS workers. As shown by the testimony of one of AAFIS's representatives, any financial services that Petitioners may have provided to AAFIS were solely incidental to their work as *teachers* of day trading. Petitioners were not acting as "investment advisers" as that term is defined under relevant Texas law but rather as teachers of day trading, and thus, they were not required by

the Texas Securities Act to register as such. Cf. App. 25-26.

During the training, neither S&D nor Cleary nor Compher held state or federal registrations or licenses as investment brokers. App. 4, 25.

The training began without a written agreement between S&D and AAFIS. The parties reached an impasse in their negotiations of a written contract. AAFIS terminated its oral contract with S&D, Cleary, and Compher, effective October 2006. S&D had been paid periodically for its work, but was due additional compensation. App. 4.

In November 2006, S&D filed suit against AAFIS, alleging breach of contract and misappropriation of trade secrets. S&D later amended its complaint, dropping the trade secrets claim and adding claims for quantum meruit, unjust enrichment, and money had and received. App. 4.

In April 2008, AAFIS moved for summary judgment, alleging S&D's failure to register as an investment adviser or broker/dealer with state and federal authorities precluded it from recovering under the oral agreement between the parties. S&D responded that it was not a broker/dealer and that it qualified under a "teacher" exception to the investment adviser registration requirements. S&D showed that (1) any broker-type work it engaged in was wholly incidental to its work as teachers, (2) it did not engage in the business of brokering, and (3) it did not receive any transaction based compensation. App. 4.

The District Court granted AAFIS's motion for summary judgment because S&D had failed to register as an investment adviser as required by the Texas Securities Act. App. 25-26. The District Court rejected S&D's contention that it fit into the teacher exception. *Id.* The District Court looked to a single Securities and Exchange Commission no-action letter from 1977, which interpreted an almost identical exception to the investment adviser provision of the federal Investment Advisers Act. It concluded that the teacher exception "only covers actual teachers who work for accredited and certified institutions or schools of higher learning." S&D did not qualify. App. 26, 5.

The District Court entered a final judgment in favor of AAFIS on June 3, 2008, awarding costs for defending the action. App. 27. AAFIS submitted a bill of costs. The District Court clerk originally taxed S&D with the full amount of costs requested; however, S&D objected, arguing that AAFIS should not recover the costs of obtaining six video depositions. Following a hearing, the District Court disallowed the extra costs, awarding costs at a lower amount than originally requested. App. 27, 5.

Both parties timely appealed, S&D as to the court's summary judgment and AAFIS regarding the award of costs. Their appeals were consolidated. App. 5.

In an unpublished opinion dated July 1, 2009, the Fifth Circuit Court of Appeals affirmed the District Court's decision that the teacher exception of the

Texas act did not apply to Petitioners, and affirmed the District Court's decision regarding the payment of costs. App. 1-23.

This Petition does challenge the Fifth Circuit Court of Appeals's affirmation of the award of costs.

III. REASONS FOR GRANTING WRIT

This Court should grant the writ of certiorari for the following reasons:

Issue 1: The Fifth Circuit Court of Appeals erred in interpreting the teacher exception contained in the Texas State Securities Act, TEX. REV. CIV. STAT. ART. 581-4N, because its narrow and restrictive interpretation of the state statute directly contravened Texas state law rules of statutory construction.

The Texas state securities act mandates that a teacher, whose performance of investment services is "solely incidental to the practice of [his] profession" need not register as an investment adviser. TEX. REV. CIV. STAT. ART. 581-4N. The Texas Act does not define the term "teacher."

Under Texas state law, the statutory term "teacher" must be given its ordinary meaning as required by Texas statute. This is mandatory given the fact that the statute fails to define the term. TEX. GOV'T CODE 311.011(a) ("Words and phrases shall be

read in context and construed according to rules of grammar and common usage."); *Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 925 (Tex. 2008) (applying Section 311.011, noting that statutory terms "that are not otherwise defined are typically given their ordinary meaning."); *Marks v. St. Luke's Episcopal Hosp.*, ___ S.W.3d ___, 52 Tex. Sup. Ct. J. 1184, 2009 WL 2667801 (Tex. Aug. 29, 2009) ("When interpreting a statute, we read words and phrases in context and construe them according to the rules of grammar and common usage. TEX. GOV'T CODE § 311.011(a). Words that are not defined are given their ordinary meaning."). When the state legislature fails to define a word or term, courts will apply its ordinary meaning. *See Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 939 (Tex. 1993); *Marks*, 52 Tex. Sup. Ct. J. 1184, 2009 WL 2667801.

When applying the ordinary meaning, courts applying Texas law may not by implication enlarge the meaning of any word beyond its ordinary meaning. *Monsanto Co.*, 865 S.W.2d at 939. "It is inappropriate for courts to enlarge the meaning of any word in a statute beyond its plain and ordinary meaning by implication when legislative intent may be gathered from a reasonable interpretation of the statute as it is written." *Energy Service Co. of Bowie, Inc. v. Superior Snubbing Services, Inc.*, 236 S.W.3d 190, 198 (Tex. 2007), citing *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex. 1994).

In determining the ordinary meaning of an undefined term, Texas courts have consulted the term's common law usage, interpretation when used in other statutes, and definitions in secondary sources. *See, e.g., Monsanto Co.*, 865 S.W.2d at 938-40 (common-law usage); *Little v. State*, 246 S.W.3d 391, 400-01 (Tex. App. – Amarillo 2008, no pet.) (common-law usage and construction in other statutes); *Williamson Pointe Venture v. City of Austin*, 912 S.W.2d 340, 344 (Tex. App. – Austin 1995, no writ) (using definition found in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY).

In this case, both the District Court and the Fifth Circuit Court of Appeals both improperly enlarged the meaning of the word "teacher" beyond its ordinary meaning. This contravenes Texas law. The common understanding of the word "teacher" does not include the concept of being on staff at a college or university. As defined in WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (1972) "teacher" means "a person who teaches, esp. as a profession; instructor." Similarly, the MERRIAM-WEBSTER ONLINE DICTIONARY (accessed September 2009) defines the word "teacher" as "one who teaches; especially, one whose occupation is to instruct." As understood in common, ordinary usage, the word "teacher" describes someone who teaches, especially someone whose occupation is instructing. A "teacher" need not be a professor or lecturer at an accredited, certified institution of higher learning, college or university. Had the Texas Legislature intended such a

requirement, it would have used the word "professor" instead of the word "teacher," or would have provided a definition for the term teacher that specifically states that a "teacher" for the purpose of the statute is one who teaches at an accredited, certified institution of higher learning, college or university.

Because the Texas Legislature did not define the term "teacher" in the Texas Securities Act, the Fifth Circuit Court of Appeals erred in failing to apply the ordinary definition of the term "teacher" as it appears therein. The ordinary understanding of the term "teacher" encompasses all persons who instruct, and thus, the term should properly encompass the activities of Petitioners who were serving as *teachers* – not brokers or investment advisers. Any broker or adviser type work S&D performed was wholly incidental to its teaching role. To the degree that Texas courts may look to decision of federal courts to interpret the Texas Securities Act due to the statutory similarities, *see Akin v. Q-L Invs., Inc.*, 959 F.2d 521, 532 (5th Cir. 1992), Petitioners demonstrate below that the cited federal authorities are inapposite. As such, the Court of Appeals erred in its construction of the teacher exception to the Texas Securities Act, and this Court should grant writ to correct the Fifth Circuit Court of Appeals's misapplication of Texas statute.

Issue 2: The Fifth Circuit Court of Appeals erred to the degree that it gave the "teacher exception" a narrow, restrictive construction, relying solely on SEC opinion letters which interpreted the federal Investment Advisers Act.

As seen, under the federal Investment Advisers Act of 1940, the requirement to register as an investment adviser does not apply to a teacher or other professional "whose performance of the services is solely incidental to the practice of the person's profession." 15 U.S.C. § 80b-2(a)(11). Although the lower courts did not decide this case on the basis of the federal act, *per se*, they nevertheless relied solely on underlying federal interpretative authorities (i.e., SEC no-action letters) and defined the word "teacher" as used in the Texas Act based on these letters. In reaching this conclusion, both lower courts gave an overly narrow and constraining interpretation to the term "teacher" due to their reliance on these letters.

A. The three SEC no-action opinion letters are poor yardsticks of statutory interpretation in this case

The three authorities relied on by the Fifth Circuit Court of Appeals are opinion letters of the Securities and Exchange Commission (SEC). App. 1-16. There appear to be no federal *judicial* opinions that directly address the scope of the "teacher" exception to the federal Investment Advisers Act of 1940. While federal courts may consider SEC no-action

letters as persuasive authority regarding the proper interpretation of the federal act, the no-action letters are binding on neither federal courts nor the Securities and Exchange Commission itself. *See Allarie Corp. v. Okumus*, 433 F.3d 248, 254 (2nd Cir. 2006) ("The SEC no-action letter does not bind us, but we find it persuasive."), citing *Mony Group, Inc. v. Highfields Capital Mgmt., L.P.*, 368 F.3d 138, 146 (2nd Cir. 2004) (no-action letters may be relied upon for their persuasiveness). While perhaps persuasive, the no-action letters are not binding even as to the federal act. *Id.*

As shown herein, the Court of Appeals's use of the SEC no-action letters is problematic for several reasons; this case presents the opportunity for the federal judiciary to craft a fair, workable definition of the term "teacher" as it is used in the relevant acts.

1. Canouse opinion letter

The Court of Appeals relied upon a 1977 Securities and Exchange Commission agency no-action letter. Letter to Joseph P. Canouse, 1977 WL 10657 (May 26, 1977). App. 11-12. This was the only authority cited by the District Court. App. 26. The Court of Appeals believed that the Canouse no-action letter mandates a narrow definition of the term "teacher" – one that would effectively restrict the term to university or college professors; however, the Canouse opinion letter is not a judicial determination of the term's scope. The letter simply observed:

> *Among the factors we have in the past considered* in deciding whether an individual is eligible for this exclusion are whether his compensation for teaching is paid by an educational institution, whether the course he is teaching is part of a program regularly offered by an educational institution, whether the school or institution is accredited, and the manner in which the course is offered to the public.

1977 WL 10657 (emphasis added); App. 12. Teachers at a university are certainly *one example* of a "teacher," but they are not the only example. The Canouse letter does not purport to be an exhaustive survey of teacher status. Moreover, the no-action letter candidly admits, "Moreover, your letter *does not indicate any facts that would qualify your client for any of the exemptions from registration* set forth in Section 203(b) of the Act." (emphasis added). Mr. Canouse's letter of inquiry which resulted in the SEC's opinion letter was two-paragraphs in length and perfunctory:

> Gentlemen:
>
> A client of mine wishes to teach individuals how to invest in the stock market and charge so much per lesson. He would not issue any newsletter or periodical advisory letters – merely instruct individuals on the various market timing devices – Dow Jones theory, etc.
>
> Please advise if there are any regulations governing how to invest in the market.

> If there are, please send me two sets of any rules or regulations involved.
>
> Sincerely,
>
> J.P. Canouse

The less-than-thorough presentation of facts in Canouse strongly militates in favor of a federal court being allowed to determine the definition of the statutory word "teacher," and the scope of the teacher exception, for itself as developed through adversarial litigation.

2. Rodgas opinion letter

The Court of Appeals cited another SEC no-action letter, J.H. Rodgas, Jr., 1974 WL 10941 (Sept. 7, 1974), as authority for a narrow interpretation of the teacher exception under the federal act. App. 12-13. Although the SEC did observe that a "teacher" was normally associated with an educational institution, the SEC expressed equal concern with the fact that the proposed teaching was being offered to the general public through a newspaper:

> . . . it appears that the inducement to be offered by SMT to potential students is the ability to use the course in a manner that will enable them to profit from investments in securities. For instance, *the newspaper advertisement states that 'the stage is set now FOR A GREAT UPSURGE in stock prices – we believe it will be soon' and 'or will you wait until everyone else is buying and join the*

> *stampede to buy after the real bargains are gone.*' The whole thrust of SMT's proposed advertising appears to be an attempt to sell SMT's course to the public for use by them in making their own investment decisions. Even its descriptive label at the top of the newspaper advertisement and on the cover of the brochure states that SMT is 'a course in investing and trading in the stock market for capital gains.'

1974 WL 10941 (emphasis added). In contrast, there was no evidence presented in this case that Petitioners advertised their services to the general public, via newspaper or any other medium, but were solicited to provide teaching services. The Rodgas no-action letter is therefore distinguishable, and the Court of Appeals's reliance upon it is less than persuasive. App. 12-13.

3. Umstead opinion letter

Finally, the Court of Appeals cited a 1976 no-action letter, to David A. Umstead, 1976 WL 12176 (Aug. 13, 1976) as additional support for the proposition that the teacher exception contained in the Texas statute has a narrow, restrictive scope. App. 13-15. In Umstead, the no-action letter made clear that the proposed seminar was outside the normal scope of instruction at the Whatron School and that it was "being offered to the public not primarily as an educational experience, but rather for the purpose of influencing investment decision making. . . ." *Id.*

Petitioners did not attempt to influence investment decision making. They simply taught day trading. Once again, the factual dissimilarities and relative terseness of the SEC's no-action letter makes it a poor guide for defining statutory intent. A federal court should be allowed to determine the definition of the statutory word "teacher" and the scope of the teacher exception for itself through adversarial litigation.

B. The record confirms that Petitioners were not acting as brokers and did not receive transaction based compensation, reinforcing the fact that they were indeed teachers who did not require registration.

This case demonstrates the inherent unfairness in defining the statutory term "teacher" so narrowly as to effectively restrict it to college and/or university professors. The record confirms that Petitioners were acting first and foremost as teachers – not brokers – and that any regulated activity in which they may have engaged was incidental to their role as teachers.

Under the Securities Exchange Act of 1934 ("SEC Act"), the "term 'broker' means any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). The statutory phrase, "engaged in the business" is not defined by the SEC Act. However, cases interpreting the phrase have indicated that regularity of participation in securities transactions is a primary indicia of being "engaged in the business." *See, e.g., SEC v.*

Margolin, 1992 WL 279735 (S.D.N.Y. 1992), citing *Massachusetts Fin. Servs., Inc. v. Securities Investor Protection Corp.*, 411 F. Supp. 411, 415 (D. Mass. 1976). Regularity of participation has been established by factors such as the dollar amount of securities sold. *See SEC v. National Executive Planners, Ltd.*, 503 F. Supp. 1066, 1073 (M.D.N.C. 1980) ($4.3 million of securities sold); *UFITEC, S.A. v. Carter*, 20 Cal.3d 238, 142 Cal.Rptr. 279, 571 P.2d 990 (1977) (several million dollars of securities sold); and the extent to which advertisement and investor solicitation were used, *see SEC v. Deyon*, 977 F. Supp. 510, 518 (D. Me. 1997) (substantial solicitation occurred).

A person effects transactions in securities if he or she participates in such transactions "at key points in the chain of distribution." *Massachusetts Fin. Servs.*, 411 F. Supp. at 415; *see also National Executive Planners, Ltd.*, 503 F. Supp. at 1073. Factors indicating that a person is "engaged in the business" of a broker include, among others, regular participation in securities transactions, employment with the issuer of the securities, payment by commission as opposed to salary, a history of selling the securities of other issuers, involvement in advice to investors and active recruitment of investors, receiving transaction-related compensation, holding one's self out as a broker, and executing trades, or assisting others in settling securities transactions. *See SEC v. George*, 426 F.3d 786, 797 (6th Cir. 2005).

As shown, cases treat "being engaged in the business" as being a key component of being a broker,

yet this record does not show Petitioners were brokering transactions or acting as brokers. In response to Respondent's motion for summary judgment, Petitioners demonstrated that they were *not* engaged in the business of effecting transactions in securities for others. As such, the restrictive definition of the term "teacher," which forecloses Petitioners from relying upon the teacher exemption, is unjust. There is no evidence that Petitioners assisted any issuer in structuring prospective securities transactions, identifying potential purchasers of securities, soliciting securities transactions or participating in the order-taking or order-routing process. There is no evidence that Petitioners held themselves out as brokers, as persons who executed trades, or as persons who helped others settle securities transactions. There is no evidence that Petitioners received transaction-based compensation. Any work that Petitioners may have conducted was an integral part of their teaching. The Texas Securities Act does not require registration of a person whose performance of otherwise covered activities is "solely incidental to the practice of the person's profession." TEX. REV. CIV. STAT. ART. 581-4N. Accordingly, denying Petitioners access to the teacher exception to registration is unfair and violative of the public policy reflected in the statutes.

Given this record, Petitioners should properly be regarded as "teachers" who did not need to register as investment advisers under either the Texas or federal investment advisers acts. This Court should use this case as an opportunity to fashion a judicial definition

of the term "teacher" that fairly takes into account the actual activities of individuals.

CONCLUSION

This Court should exercise its discretion and grant the writ of certiorari to review this case, which presents an issue of statutory interpretation under Texas state law, in which the opinions below apply exclusively federal authorities. The decision of the Fifth Circuit Court of Appeals should be reversed, and the case remanded to the District Court for further proceedings in accordance herewith. Petitioners request all relief to which they may be justly entitled.

Respectfully submitted,

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2009 WL 1885881

United States Court of Appeals,
Fifth Circuit.

S & D TRADING ACADEMY, LLC;
S & D Global Trading Inc, Plaintiffs-Appellants
v.
AAFIS INC, Defendant-Appellee
S & D Trading Academy, LLC;
S & D Global Trading Inc, Plaintiffs-Appellees
v.
AAFIS Inc, Defendant-Appellant.
Nos. 08-40711, 08-40776.

July 1, 2009.

Marc Evan Kutner, James Thomas Liston, Spagnoletti & Company, Houston, TX, for Plaintiffs-Appellants.

Ben C. Broocks, Mark L. Walters, Jackson Walker, Austin, TX, for Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 3:06-CV-739.

Before REAVLEY, WIENER, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

S & D Trading Academy, LLC and S & D Global Trading, Inc. (collectively, "S & D") appeal the district court's grant of summary judgment in favor of AAFIS, Inc. on S & D's contractual and quasi-contractual claims. AAFIS cross-appeals regarding the award of costs. For the reasons that follow, we AFFIRM the district court's ruling with respect to each issue.

I. BACKGROUND

In early 2005, AAFIS approached Donald J. Cleary about giving training on the day trading of stocks. AAFIS, a Los Angeles based investment company, is an active trader in the United States stock markets. It employs a company based in China called Asian American Association, Shen Yang, Limit Liability Company ("ASY"). ASY employs Chinese citizens to trade on AAFIS's account, but ASY's employees first need to be trained. Cleary was to train twenty-eight of ASY's Chinese traders. Cleary recruited Robert Compher to assist him with the training. Those two formed S & D Trading Academy, LLC and S & D Global Trading, Inc., through which they would provide their services to AAFIS.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

S & D entered into an oral agreement with AAFIS to train the ASY employees. S & D would receive a base compensation of one dollar for every thousand shares traded during a six-month probationary period and for up to thirty-six months thereafter. Bonus compensation would be based on the profits generated by the traders. Training occurred both in Texas and China. While in Texas, S & D performed most of its training in an apartment furnished with tables and computers; the Chinese traders both worked and lived there. The training consisted of Cleary and Compher's monitoring the live, online trading activities of the ASY employees while also trading on their own accounts.[1] Cleary and Compher further provided the employees with market research, stock recommendations, and trading strategies at the beginning of each trading day. And they set the "stop loss" for each trader, which was the maximum loss a trader could sustain before the trader was required to exit the market for the day. Cleary and Compher provided such training for a continuous period of approximately sixteen months. During the training, neither

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[1] AAFIS submits that during the trading hours, Cleary and Compher would have the traders who were not sitting at computers beside them tell them when the traders "got into a trade" so that Cleary and Compher could review the trade and give feedback regarding the transaction. The traders sitting beside Cleary and Compher on any given day received more intense instruction. AAFIS explains that Cleary and Compher would watch these traders more closely and would provide advice prior to the traders entering into a particular trade. These traders could also see the trades Cleary and Compher made.

S & D nor Cleary nor Compher held any state or federal registrations or licenses.

The training began without a written agreement between S & D and AAFIS. The parties reached an impasse in their negotiations about a contract. AAFIS terminated its arrangement with S & D, Cleary, and Compher, effective October 2006. S & D had been paid periodically for its work, but it believed additional compensation was due. In November 2006, S & D filed suit against AAFIS, alleging breach of contract and misappropriation of trade secrets. S & D later amended its complaint, dropping the trade secrets claim and adding claims for quantum meruit, unjust enrichment, and money had and received.

In April 2008, AAFIS moved for summary judgment. It alleged that S & D's failure to register as an investment adviser or broker/dealer with the proper state and federal authorities precluded S & D from recovering under the oral agreement between the parties. S & D responded that it was not a broker/dealer and that it qualified under a "teacher" exception to the investment adviser registration requirements.

The district court agreed with AAFIS and granted its motion for summary judgment solely because S & D had failed to register as an investment adviser as required by the Texas Securities Act. The court rejected S & D's contention that it fit into an exception to the statute's registration requirement for teachers. The court looked to a Securities and Exchange Commission no-action letter. That letter interpreted an

almost identical exception to the investment adviser provision of the federal Investment Adviser Act. It concluded that the teacher exception "only covers actual teachers who work for accredited and certified institutions or schools of higher learning." S & D did not qualify.

The court entered a final judgment in favor of AAFIS in June 2008, awarding costs for defending the action. AAFIS submitted a bill of costs. The district court clerk originally taxed S & D with the full amount of costs requested. However, S & D filed an objection to the bill of costs, arguing that AAFIS should not recover the costs of obtaining six video depositions. Following a hearing on the issue, the district court disallowed the video deposition costs and awarded costs at a lower amount than originally requested.

Both parties timely appealed, S & D as to the court's summary judgment and AAFIS regarding the award of costs. Their appeals have been consolidated.

II. DISCUSSION

A. Investment Adviser Registration

We review a grant of summary judgment *de novo*, applying the same standard as the district court. *Noble Energy, Inc. v. Bituminous Cas. Co.*, 529 F.3d 642, 645 (5th Cir.2008). Summary judgment is proper when the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there

is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A district court's summary judgment may be affirmed on any ground that was raised below and is supported by the record. *Aryain v. Wal-Mart Stores Tex. LP,* 534 F.3d 473, 478 (5th Cir.2008).

The Texas Securities Act, also known as a "Blue Sky Law," provides that "a person may not, directly or through an investment adviser representative, render services as an investment adviser in this state unless the person is registered under this Act . . . or is otherwise exempt under this Act." Tex.Rev.Civ. Stat. Ann. art. 581-12B. It further states that

> [n]o person who has made or engaged in the performance of any contract in violation of any provision of this Act or any rule or order or requirement hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

Id. at art. 581-33K. Thus, an unregistered individual or entity providing investment adviser services may not legally enforce a contract entered into regarding the provision of such services.

The Texas Securities Act defines "investment adviser" as follows:

> a person who, for compensation, engages in the business of advising another, either directly or through publications or writings, with respect to the value of securities or to the advisability of investing in, purchasing, or selling securities or a person who, for compensation and as part of a regular business, issues or adopts analyses or a report concerning securities. . . . The term does not include:
>
> . . .
>
> (2) a lawyer, accountant, engineer, *teacher,* or geologist whose performance of the services is solely incidental to the practice of the person's profession. . . .

Id. at art. 581-4N (emphasis added). It does not, however, include a definition of the term "teacher."

The Investment Adviser Act of 1940, a federal statute, similarly requires the registration of investment advisers and provides that "[e]very contract made in violation of any provision of this subchapter . . . , the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this subhcapter [sic], or any rule, regulation, or order thereunder, shall be void. . . ." 15 U.S.C. § 80b-15(b). Like the Texas Act, the Investment Adviser Act defines "investment adviser" as

> any person who, for compensation, engages in the business of advising others, either directly or through publications or writings

> as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include . . . (B) any lawyer, accountant, engineer, or *teacher* whose performance of such services is solely incidental to the practice of his profession. . . .

Id. § 80b-2(a)(11) (emphasis added). The federal Act, however, exempts from its registration requirement an "investment adviser that is regulated or required to be regulated as an investment adviser in the State in which it maintains its principal office and place of business, . . . unless the investment adviser . . . has assets under management of not less than $25,000,000. . . ." *Id.* § 80b-3a(a)(1). "'[A]ssets under management' means the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services." *Id.* § 80b-3a(a)(2).

S & D maintains that the district court erred in concluding that it was required to register as an investment adviser under the Texas Securities Act. It contends that any investment advising services it provided under its agreement with AAFIS were solely incidental to its primary purpose of teaching AAFIS's employees how to day trade on the New York Stock Exchange, and it therefore qualified for the teacher exception to the investment adviser registration requirement.

Initially, S & D attacks the basis for the district court's decision. It notes that the sole authority that the court cited is an SEC no-action letter from 1977, which is not binding with respect to the proper interpretation of a Texas statute. S & D submits that reversal is appropriate because the court relied exclusively on a federal, administrative-level opinion interpreting the federal rather than the Texas statute. S & D explains that even though the position of the administrative agency charged with enforcement of a statute is entitled to substantial weight, it is not conclusive. Furthermore, S & D points out that the court's reliance on federal authority deprives the Texas courts of the opportunity to develop their own definition of the teacher exception.

Rather than relying on the no-action letter, S & D maintains that the district court should have simply given the term "teacher" its common meaning. S & D submits that a Texas statute requires that terms not otherwise defined in a statute be given their ordinary meaning. Section 311.011 of the Texas Government Code provides: "(a) Words and phrases shall be read in context and construed according to the rules of grammar and common usage. (b) Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Moreover, cases applying Section 311.011 have stated that statutory terms "that are not otherwise defined are typically given their ordinary meaning." *Guitar Holding Co., L.P. v.*

Hudspeth County Underground Water Conservation Dist. No. 1, 263 S.W.3d 910, 915 (Tex.2008).

Citing an online dictionary, S & D concludes that the common usage of the word "teacher" is to describe someone who teaches, and especially someone whose occupation is instructing. It argues that a teacher need not be a professor or lecturer at an accredited and certified institution of higher learning. S & D suggests that if the legislature had intended such a requirement, it would have used the word "professor" instead of the word "teacher."

Although there is no authority construing the Texas provision, there are a number of SEC no-action letters concerning the teacher exception to the federal investment adviser statute. S & D is correct that these are not controlling authority regarding the meaning of the Texas exception. However, the Texas provision is nearly identical to its federal counterpart, which was promulgated nearly sixty years earlier.

Moreover, because there is very little authority interpreting the Texas provision itself, the "Texas courts generally look to decisions of the federal courts to interpret the Texas Securities Act because of the obvious similarities between the state and federal laws." *Akin v. Q-L Invs., Inc.*, 959 F.2d 521, 532 (5th Cir.1992) (citing *Star Supply Co. v. Jones*, 665 S.W.2d 194, 196 (Tex.App.-San Antonio 1984, no writ)). Indeed, the Texas Supreme Court has explained that the Texas legislature intended the Texas Securities Act "to be interpreted in harmony with federal securities

law." *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 840 (Tex.2005). The Act itself states that it "may be construed and implemented to effectuate its general purpose to maximize coordination with federal and other states' law and administration, particularly with respect to . . . exemptions." Tex.Rev.Civ. Stat. Ann. art. 581-10-1A. Finally, though no-action letters are not binding on the courts or the SEC, federal courts may consider them persuasive authority regarding the proper interpretation of the federal provision. *See Allaire Corp. v. Okumus*, 433 F.3d 248, 254 (2d Cir.2006).

Whatever our decision here, the Texas courts obviously retain their authority to define ths [sic] state statutory term differently. We proceed to define it based on what is available for our consideration.

In the SEC no-action letter relied on by the district court, an attorney sought to determine the regulations governing a client who wished "to teach individuals how to invest in the stock market and charge so much per lesson." Joseph P. Canouse Esquire, SEC No-Action Letter, 1977 WL 10657, at *1 (July 15, 1977). The client did not plan to issue newsletters or advisory letters, but merely intended to "instruct individuals on the various market timing devices – Dow Jones theory, etc." *Id.* In response to the inquiry, the Commission explained the scope of the teacher exception to the investment adviser registration requirement as follows:

> Among the factors we have in the past considered in deciding whether an individual is eligible for this exclusion are whether his compensation for teaching is paid by an educational institution, whether the course which he is teaching is part of a program regularly offered by an educational institution, whether the school or institution is accredited, and the manner in which the course is offered to the public.

Id. The Commission concluded that based on the information contained in the attorney's letter, it appeared that his "client's proposed activities would place him within the definition of investment adviser" and that the teacher exception would not be available to him. *Id.*

In another no-action letter, an individual was planning to start a "stock market school" and requested guidance regarding whether he was required to register with the SEC. J.H. Rodgas, Jr., SEC No-Action Letter, 1974 WL 10941, at *1 (Sept. 7, 1974). The school was described as follows:

> [T]he course will be completely and purely instructional in concept and execution. Students will never be advised to buy or sell securities or to commit funds to any kind of investment. . . . We will teach them where to find and how to [e]valuate available information but emphasize that the final decision to buy or sell must be theirs alone. . . . In summary, our planned course of instruction is not an advisory service and no promises or

> predictions as to performance of any stock or group of stocks will ever be made to students. Instead, the students will be shown all of the various forces acting on the market, will be taught how to identify and evaluate those forces and will be shown how to make their own evaluations and their own market decisions.

Id. The Commission determined that the school would qualify as an investment adviser and therefore would be required to register before engaging in its proposed activities. *Id.* at *4. Furthermore, the teacher exception would not apply because the school did not "appear to have the attributes normally associated with an educational institution." *Id.* The Commission noted that there was no indication that the school had been approved by an authorized state or federal agency or that it was an accredited educational institution. *Id.* Moreover, the inducement offered by the school to potential students was "the ability to use the course in a manner that will enable them to profit from investments in securities." *Id.*

The SEC again emphasized the narrow scope of the teacher exception in a no-action letter involving an assistant professor of finance at the Wharton School. He asked the SEC for a ruling regarding whether he was required to register as an investment adviser for conducting a series of investment strategy seminars for extra money. David A. Umstead, SEC No-Action Letter, 1976 WL 12176, at *1 (Aug. 13, 1976). The one-day seminars that he intended to teach

included a discussion of the theoretical development of investment strategy and a general description of the different kinds of investment securities. *Id.* "In summary, the overall intent of the course [was] to build an analytical framework for making long run investment decisions and to make a general assessment of the current opportunities available in the securities markets." *Id.* It was not "a course of 'hot tips' with up to the minute assessments on individual securities." *Id.* The Commission concluded that teaching this course would constitute acting as an investment adviser and therefore required a registration. *Id.* at *2. Furthermore, the teacher exception would not apply for a number of reasons. *Id.* First, compensation for the seminars would be separate and in addition to the usual teaching salary. *Id.* Second, although participants in the seminar would receive certificates from the Wharton School, there was no indication that the course was a "part of the regular curriculum of study offered at that institution." *Id.*[2]

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[2] *See also* Walter H. Shapiro, SEC No-Action Letter, 1978 WL 11703, at *2 (July 26, 1978) ("We have construed the term 'teacher' to mean a person who is a member of the teaching profession[,] and we have considered advisory services performed by a teacher to be solely incidental to the practice of a teacher's profession, and, thus, not to cause the teacher to come within the definition of investment adviser, when they are rendered in the course of instruction in a study which is given under the auspices of an academic institution."); Frank T. Hines, SEC No-Action Letter, 1972 WL 8250, at *1 (Aug. 21, 1972) (responding to a question regarding whether SEC registration would be required to conduct a college course in stock market strategy, the Commission explained, "we would be happy to consider a

(Continued on following page)

Finally, the investment course was "being offered to the public not primarily as an educational experience, but rather for the purpose of influencing investment decision making and assisting participants to maximize profits for their investments. . . ." *Id.*

The SEC no-action letters construing the federal provision are persuasive. We conclude that the teacher exception does not apply to the training provided by S & D. Neither Cleary nor Compher were professional teachers. They were not associated with an accredited school or course, and their training was not part of a program regularly offered by an educational institution. Moreover, their training was not academic in nature. They provided the traders with market research, stock recommendations, and trading strategies for a particular day or particular stock. The goal of the training was to influence the investment decision making of the Chinese traders and to enable them to maximize their profits. Applying the teacher exception under these circumstances would allow almost any investment adviser to qualify for the exception so long as they accompanied their advice with a justifying explanation. This result would undermine the general purpose of the Texas Securities Act, which is "to protect investors." Tex.Rev.Civ. Stat. Ann. art. 581-10-1B.

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request for interpretation from an accredited institution which provides in detail a description of the course, and the background on the individuals who are conducting the course, including a brief description of their other academic responsibilities").

We are not convinced by S & D's argument that we should give the term "teacher" its plain and ordinary meaning. Although the Texas code contains a canon of interpretation suggesting that undefined words should be given their ordinary meaning, the definition S & D proposes is circular and imprecise. It makes a teacher anyone who teaches. Contrary to the cited canon, which states that words should be read in context, this proposed definition is divorced from the context of the Texas Securities Act and would contravene the overall purpose of the Act, as discussed above.

Because S & D does not qualify for the teacher exception and was not registered as an investment adviser as required under the Texas Securities Act, the district court properly granted summary judgment in favor of AAFIS on S & D's contractual and quasi-contractual claims. Because of this conclusion, we need not consider AAFIS's alternative arguments that summary judgment was proper for other reasons.

B. Award of Costs

A "district court has broad discretion in taxing costs, and we will reverse only upon a clear showing of abuse of discretion." *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1049 (5th Cir.1998). Moreover, within its wide discretion, a district court may order each party to bear its own costs. *Hall v. State Farm Fire & Cas. Co.*, 937 F.2d 210, 216 (5th Cir.1991).

AAFIS argues that the costs it incurred in obtaining copies of videotaped depositions should be taxed against S & D. It admits that at the time of the district court's ruling on costs, controlling Fifth Circuit law precluded the recovery of such costs. *See Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 529-30 (5th Cir.2001); *Migis*, 135 F.3d at 1049. Nevertheless, AAFIS maintains that the statute upon which our prior cases were based has been amended, and it contends that we should retroactively apply the amendment to allow for video deposition costs in this case.

Prior to its recent amendment, the United States Code section dealing with the taxation of litigation costs provided that a judge or court clerk may tax the following items as costs:

> (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920 (2007). In light of Supreme Court precedent indicating that this provision should be

strictly construed, "absent explicit statutory or contractual authorization to the contrary," we have consistently held that the costs associated with videotaped depositions may not be awarded. *Mota,* 261 F.3d at 529-30 (referencing *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 444-45 (1987)). However, in October 2008, approximately three months after the costs award in this case, Congress passed the Judicial Administration and Technical Amendments Act of 2008, Pub.L. No. 110-406, 122 Stat. 4291, 4292. Section 1920(2) was amended to state that a judge may tax as costs "[f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case." 28 U.S.C. § 1920(2) (current version). There was no effective date listed for this amendment.

The Supreme Court has set forth the following framework for determining whether a statutory amendment may be applied retroactively. *See generally Landgraf v. USI Film Prods.,* 511 U .S. 244 (1994). "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." *Id.* at 280. If the statute contains no express command, then "the court must determine whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* Also, if the statute

would have retroactive effect, then a presumption against retroactivity prevents the newly enacted statute from applying absent clear congressional intent otherwise. *Id.*

Regarding procedural rules, the Court further explained:

> [c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. . . . Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.

Id. at 275. In a footnote, however, it explained that "the mere fact that a new rule is procedural does not mean that it applies to every pending case." *Id.* at 275 n. 29. Instead, the applicability of new procedural rules may depend on the "posture of the particular case." *Id.*

AAFIS relies on one of the Supreme Court's pre-*Landgraf* decisions in asserting that we should apply the amended version of Section 1920(2) to award its video deposition costs in this case. *See Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696 (1974). In *Bradley*, the Court held that a statute allowing for the award of attorney's fees, which was enacted after the case was submitted to the Court of Appeals but before its decision, should be applied to the case on appeal. *Id.* at

724. The Court anchored its holding "on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in a manifest injustice or there is a statutory direction or legislative history to the contrary." *Id.* at 711.

In *Landgraf,* the Court reaffirmed its decision in *Bradley,* specifically noting that *Bradley* did not resemble the cases in which it had invoked the presumption against statutory retroactivity: "Attorney's fee determinations, we have observed, are collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial." *Landgraf,* 511 U.S. at 277 (internal quotation marks and citations omitted). AAFIS submits that taxable costs are similar to attorney's fees, also collateral to the cause of action and "uniquely separable from the cause of action to be proved at trial." Thus, the presumption against retroactivity should not apply, and the amendments to Section 1920(2) should be applied to determine the costs taxable in this suit.

However, AAFIS's argument is foreclosed by a decision from this court applying *Landgraf* and concluding that a provision allowing for the payment of expert witness fees as a court cost should not apply retroactively to a case pending on appeal at the time of the provision's enactment. *Shipes v. Trinity Indus.,* 31 F.3d 347, 347-48 (5th Cir.1994). In *Shipes,* we considered whether a section of the 1991 Civil Rights Act providing for payment of expert witness fees as a part of costs should apply retroactively to a case in which both the relevant conduct and the trial court's

ruling occurred before the effective date of the Act. *Id.* at 347. After noting that rules regarding attorney's fees are procedural and often subject to retroactive application, we cited *Landgraf* for the proposition that "when a procedural matter has been properly decided under the old rule, and a new procedural rule is subsequently enacted while the ultimate resolution of the case is still pending, no reversal is required." *Id.* at 349. We concluded that because the district court's decision denying expert witness fees was properly decided under the law applicable at the time, there was no reversible error. *Id.*

AAFIS submits that *Shipes* does not compel affirmance in this case because the taxability of video deposition costs was not settled at the time the district court entered its costs award. Although the case law in this circuit clearly held that the costs associated with video depositions were not taxable, AAFIS contends that this was a minority position not shared by five other circuits and numerous district courts. It suggests that given this split of authority, the amendment to Section 1920(2) was a clarification of the law, rather than a change in the law. Thus, we should apply the amended version of Section 1920(2), not as the retroactive application of a new law, but as the application of the law in effect at the time of the award.

AAFIS offers as support for this position an opinion from this court stating that "changes in statutory language need not *ipso facto* constitute a change in meaning or effect. Indeed, a legislative body may

amend statutory language to make what was intended all along even more unmistakably clear." *NCNB Tex. Nat'l Bank v. Cowden,* 895 F.2d 1488, 1500 (5th Cir.1990) (internal quotation marks and citations omitted). In *NCNB Texas National Bank,* we further observed that "the existence of a dispute in the courts, such as a circuit split, may suggest that Congress was provoked to enact an amendment to clarify rather than change the law," especially when there is no indication in the legislative history that Congress intended to change the law or there is no dispositive legislative history at all. *Id.* at 1500-01. We were not, however, deciding whether statutory amendments should be applied retroactively. Rather, we were considering whether recent amendments provided additional support for our interpretation of the pre-amendment version of a statute. *Id.* at 1499-1501. As such, *NCNB Texas National Bank* is inapposite here.

We conclude that *Shipes* is controlling. At the time the district court ruled, the costs associated with videotaped depositions were clearly not taxable under the law of this circuit. Because the district court properly decided the costs issue under the law applicable at the time, our decision in *Shipes* proscribes retroactive application of the amendments to Section 1920(2) in the present case. Accordingly, the district court did not abuse its discretion in denying AAFIS the costs associated with the videotaped depositions.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment and AFFIRM its award of costs.

2008 WL 2325167

United States District Court,
S.D. Texas,
Galveston Division.

S & D TRADING ACADEMY, LLC, et al.
v.
AAFIS INC., et al.
Civil Action No. G-06-739.

June 3, 2008.

Francis I. Spagnoletti, David S. Toy, Spagnoletti & Company, Houston, TX, for S & D Trading Academy, LLC, et al.

Ben C. Broocks, Mark L. Walters, Jackson Walker LLP, Austin, TX, Lionel M. Schooler, Jackson Walker LLP, Houston, TX, for Aafis Inc., et al.

OPINION AND ORDER

JOHN R. FROESCHNER, United States Magistrate Judge.

After full consideration of the Motion for Summary Judgment of Defendant AAFIS, Inc., the Court issues this Opinion and Order.

The facts relevant to the issue dispositive of the Motion can be almost entirely summarized by borrowing a sentence from the Plaintiffs' response: (Plaintiffs) "Donald J. Cleary ("Cleary") and Robert Compher ("Compher"), first as individuals, and then as principles of Plaintiffs S & D Trading Academy,

LLC. and S & D Global Trading, Inc., taught agents, servants or employees of Defendant AAFIS how to day trade stocks on the New York Stock Exchange." A few additional facts are of significance. First, in return for the teaching, Plaintiffs were to receive compensation of $1.00 for each 1,000 shares traded and a bonus of ⅓ of the net profits earned by each of the students they trained. Second, no Plaintiff, in any capacity, was ever registered as an Investment Advisor with either the Securities Exchange Commission (SEC) or the State of Texas during the performance of the underlying agreement.

Since the Plaintiffs concede that if they were required to be registered by either entity they are precluded from any recovery in this cause, the Court has confined its analysis to the sole issue of the registration requirement and, having read the Parties' submissions and authorities and having carefully evaluated their arguments, has concluded that, at the very least, the Plaintiffs were required to register as Investment Advisors with the State of Texas.

The Texas Securities Act forbids Investment Advisors from conducting business without first registering and nullifies any agreement to pay fees or commissions to an unregistered person or entity doing the business of an Investment Advisor. As AAFIS points out, the Plaintiffs, as part of their teaching regimen, "dispensed advise [sic] with respect to the value of securities, the advisability of purchasing or selling securities and market research." The Plaintiffs seem to concede that these actions clearly fall within

the definition of an Investment Advisor under Article 581-4(N), but, regardless, the Court finds that they do.

In their effort to avoid the preclusive effect of the Texas Act, Plaintiffs claim to fall within the "teacher" exception to registration contained in Article 581-4(N)(2); however, this Court finds their argument unpersuasive. By looking to the decisions of the SEC interpreting the almost identical provision in the federal statute, 15 U.S.C. § 80b-2(11), it is clear that the "teacher" exception only covers actual teachers who work for accredited and certified institutions or schools of higher learning. *See e.g.: Joseph P. Kanouse, SEC No-Action Letter,* 1977 WL 10657 (May 26, 1977) The teacher exemption is, therefore, simply unavailable to the Plaintiffs.

For the foregoing reasons, it is the **ORDER** of this Court that the Motion for Summary Judgment (Instrument no. 126) of AAFIS, Inc., is **GRANTED**.

One final observation. In the opinion of this Court had Cleary or Compher sought legal advise at the outset of this venture, competent counsel would, most likely, have advised them to enter into an enforceable written contract and properly register. Unfortunately, for the Plaintiffs, they, either purposefully or thoughtlessly, did not do so and have now suffered these adverse consequences.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

S&D TRADING ACADEMY, LLC ET AL.	§	
	§	
	§	CIVIL ACTION
VS.	§	NO. G-06-739
	§	
AAFIS INC., ET AL.	§	

FINAL JUDGMENT

On June 3, 2008, this Court issued its Opinion and Order granting the Motion for Summary Judgment of Defendant AAFIS, Inc., which is incorporated herein by reference, and it is, therefore, **ORDERED** and **ADJUDGED** that Plaintiffs, S&D Trading Academy, LLC. and S&D Global Trading, Inc., take nothing; that Plaintiffs' Complaint is **DISMISSED on the merits with prejudice**; and that Defendant AAFIS, Inc., **RECOVER** from Plaintiffs its costs of action.

THIS IS A FINAL JUDGMENT.

DONE at Brownsville, Texas, this 3rd day of June, 2008.

/s/ John Froeschner
John R. Froeschner
United States Magistrate Judge